subsection (v) to section 112 reading:

"A statement made by any person under this section whether or not a caution has been administered to him under section 113(1) shall, whenever possible, be taken down in writing and signed by the person making it or affixed with his thumbprint as the case may be, after it has been read to him in the language in which he made it and after he has been given an opportunity to make any corrections he may wish."

In *Abdul Ghani bin Jusoh*[18] the case against both appellants relied largely on the admissibility of cautioned statements given by them. None of these statements had been signed or thumbprinted by the appellants, but that notwithstanding the learned trial judge ruled that they had been made voluntarily and admitted them. This court ruled otherwise, holding that the two sections 112 and 113 should be read together, that a cautioned statement is not admissible under section 113 if not signed or thumbprinted by the accused. Wan Suleiman, F.J., said at page 27:

"... the mischief this provision [subsection (v) of section 112] is obviously designed to prevent is the concocting or 'improving' of statements by recorders thereof. Affixing the maker's signature (or thumb impression) is the universal mode of signifying its authenticity and it would be reasonable to expect refusal by the person examined to so authenticate a statement which does not accord to what he had told the police."

In the next paragraph he added:

"It will be proper to assume that Parliament is aware of the state of the law prior to these amendments including the fact that section 112(i) had prior to the addition of [subsection (v)] already made it mandatory for the recording officer to 'reduce into writing any statement' made by the person examined. It therefore follows that the words 'whenever possible' in section 112(v) can only refer to the act of obtaining the signature or thumb impression of the person examined, and not to the clause 'to be taken down in writing', an act which has already been prescribed by the earlier subsection. It is not difficult to contemplate exceptional circumstances where a court may, on being satisfied as to the reason for failure to obtain these marks of authentication, yet allow such statement to be used for the purpose to which sections 112 and 113 allow them to be used."

It is in the light of the above provisions and *Abdul Ghani bin Jusoh*[18] that Mr. Vijandran submits that the answer to this question is in the negative.

With respect we think that *Abdul Ghani bin Jusoh*[18] is distinguishable. There the cautioned statements were rejected by this court not simply because they were oral statements; the statements had been reduced into writing but the court was not satisfied that they were authentic and their voluntariness was suspect, since, in the words of Wan Suleiman, F.J., at page 27:

"no adequate reason or indeed any reason whatsoever has been advanced for the failure to obtain the signature (or thumb print) of the accused on their respective statement."

It will be noted in *Abdul Ghani bin Jusoh*[18] the question before this court was whether or not a statement not signed or thumbprinted by the accused was admissible and the court answered the question in the negative in favour of the accused in the peculiar circumstances of that case; but that in other circumstances, if for instance there had been a reasonable explanation for the omission, it might have been admissible. That case did not deal with the question before us in the instant case, namely whether or not an oral statement is admissible.

In our judgment such a statement *is* admissible because of the words "whenever possible" in subsection (v) of section 112. With respect to Wan Suleiman, F.J., in *Abdul Ghani bin Jusoh*[18], in our view these words govern not only the words "and signed by the person making it or affixed with his thumb print as the case may be", but also the words immediately preceding them, namely "be taken down in writing" – so that in our view though there is an obligation on the Inspector or whoever recorded the accused's statement to reduce it into writing, failure to do so, if there is a reasonable explanation for such failure, does not by itself render it inadmissible. So to hold is to harmonize the seemingly conflicting provision in this subsection (v) of section 112 and subsection (1) of section 113; and to hold otherwise would be to render nugatory the clear provision in the latter subsection.

Thus, in our judgment, the answer to the third question is that an oral statement made by a person before his arrest to a police officer of or above the rank of Inspector can be admitted as evidence against him where the statement has not been reduced into writing, provided there is a reasonable explanation for the failure.

Questions answered.

Solicitors: *D.P. Vijandran & Associates.*

WADKIN LUMBER CO. v. LAWAS LUMBER SDN. BHD.

[F.C. (Lee Hun Hoe C.J. (Borneo), Salleh Abas and Abdul Hamid F.JJ.) June 16 & July 14, 1982]

[Kuching – Federal Court Civil Appeal No. 40 of 1981]

Contract – Agreement to extract timber from forest reserve – Breach of contract.

The respondent had exclusive rights to fell and extract timber in a number of forest areas. It entered into a logging agreement with the appellant for the purpose of extracting timber from a forest reserve. The appellant completed constructing a road linking the JKR road with the boundary of the forest reserve and it also transported for the respondent most of the roadside logs which were felled because of the road construction to the respondent's log pond. The appellant subsequently ceased work and left the area. It alleged that having completed the road to the boundary of the forest reserve it was entitled to be supplied with approved blocks for timber extraction and as the respondent had failed or delayed to supply the blocks this constituted a breach of the agreement. The respondent on the other hand denied the allegation of breach by it and alleged that it was the appellant who broke the agreement. It claimed that the appellant had not constructed the road in accordance with the agreement so as to satisfy the Forest Department and enable the permit to enter the reserve to be given.

The respondent maintained that the road to be built must be both outside and inside the Contract area and as the appellant had not completed the road construction it was in breach of the agreement. The learned trial judge accepted the respondent's contention and held that it was the appellant, not the respondent, who was in breach of the agreement. He held that the appellant was entitled to

payment for the work it had done in constructing the road and in transporting the logs but dismissed its claim for general damages. The learned judge also made no decision on the respondent's counterclaim as it was agreed that this should await the outcome of the appellant's suit. The appellant in the meantime appealed.

Held: the learned trial judge was correct in holding that it was the appellant who was in breach of the agreement and therefore the appeal must be dismissed.

Case referred to:

(1) *Farrell* v. *Secretary of State for Defence* [1980] 1 All E.R. 166.

FEDERAL COURT.

K.Y. Lin for the appellant.

C.T. Wong for the respondent.

Cur. Adv. Vult.

Salleh Abas F.J. (giving the judgment of the court read by Lee Hun Hoe C.J. (Borneo)): The appellant and the respondent are both timber logging companies. The respondent held exclusive rights to fell and extract timber under Licence No. T/0212 granted to Sarawak Foundation from a number of forest areas, one of which is known as Kota Forest Reserve. On February 26, 1977 the respondent entered into a logging agreement with the appellant for the purpose of extracting timber from Kota Forest Reserve referred to in the agreement as the Contract Area. Hardly a year passed from the above date when differences between them arose concerning the performance of the agreement although the appellant had by about October, 1977 done two jobs under the purview of the agreement. It had completed constructing a road at the request of the respondent linking JKR road with the boundary of Kota Forest Reserve and it also transported for the respondent most of the roadside logs which were felled because of the road construction to the respondent's log pond. By early November, 1977 the appellant ceased work and left the area.

On December 20, 1977 the appellant took out a writ against the respondent alleging breach of the agreement by the respondent and claimed special damages in the sum of $820,400.00 and general damages in the sum of $4,800.00 and also costs of the suit. The respondent on the other hand filed its Statement of Defence in which it denied the allegation of breach by it and in addition to its denial alleged that it was the appellant who broke the agreement. The respondent therefore counterclaimed a sum of $110,000.00 as loss of profits from the date of the agreement (February 26, 1977) to January 25, 1978 when it itself began to work the area. It also counterclaimed an unspecified amount as continuing loss of profits.

The learned trial judge held that it was the appellant, and not the respondent, who was in breach of the agreement, but because it had done some work in constructing the road and transporting the roadside logs, he awarded in favour of the appellant a sum of $63,352.27 for road construction and another sum of $17,543.60 for transportation, thus making a total of $80,895.87. Except for these two items he disallowed all other claims of the appellant and reserved the question of costs to a later stage. He also made no decision just yet on the respondent's counterclaim because it was mutually agreed between the parties that the counterclaim should await the outcome of the appellant's suit.

In the meantime being dissatisfied with the decision of the learned trial judge the appellant appeals to us.

For the purpose of this judgment it is necessary for us to refer to the relevant clauses of the agreement. These are clauses 3, 4 and 7 (e) which are reproduced below as follows:

"3. At the instruction of the Employer, the Contractor has to maintain and build all main roads to the said Forest Area including Forest Tracks for logging."

"4. The Employer hereby agrees and undertakes:–

"(a) To reserve the whole of the said Contract Area namely Proposed Camp No.2 to the Contractor alone.

(b) To make available to the Contractor not less than four (4) blocks at any one time for the Contractor to work and to allow the Contractor to enter into the work therein simultaneously.

(c) To apply for and obtain all necessary Permits and Licences (including renewals or extensions) for the Contractor to bring into the said Contract Area such workers and other personnel and all equipment including (but not limited to) Tractors, Bulldozers and Logging Trucks and subject to Government's approval.

(d) To inform the Contractor the block (s) in which the Contractor shall work."

7. The Contractor shall at his sole cost and expense –

(e) Construct and maintain all timber tracks in the said Contract Area."

It is the case for the appellant that once it had completed constructing two miles of road from the junction of JKR road linking the boundary of the Contract Area, it is entitled to be supplied with approved and enumerated blocks under clause 4 (b) of the agreement so as to enable it to proceed with timber extraction from the Contract Area and that the failure or delay by the respondent to supply the blocks constituted a breach of the agreement.

The respondent denied that it was delaying the supply of the blocks. Approval of the block did not lie with the respondent but with the Forest Department, to whom the respondent had to apply. It could not possibly apply for them, nor would the Forest Department consider its application unless the work ordered by the Department was done according to its satisfaction. This work is contained in a document referred to as "Permit to Enter Coupe" (IDA) issued by the Department to the licensee, i.e. Sarawak Foundation, on June 18, 1977. It consists of the following items of work, namely:—

"(10) Cut and demarcate coupe boundaries.

(11) Cut preliminary road alignment.

(12) Construct road.

(13) Demarcate logging blocks."

It was conceded by both parties that whilst the work specified in items 10, 11 and 13 was the responsibility of the respondent, the work specified in item 12, i.e. road construction was the appellant's obligation, because of clause 3 of the agreement. It is the contention of the respondent that the appellant had not constructed the road within the meaning of this clause and item 12 of the Permit to Enter Coupe, although it had constructed the two miles of road outside the Contract Area. The respondent maintained that the road to be built under this clause and item 12 must be both outside and inside the Contract Area and that as the appellant had not constructed the road inside the area, there could not be any case of the appellant's entitlement to approved blocks and that by leaving the locality in November, 1977 without completing the road construction the appellant itself was in breach. The learned trial judge accepted the respondent's contention and we agree with him.

This case in our view solely hinges upon the issue as to the type of road which the appellant was required to build under clause 3 of the agreement. According to this clause the appellant had to maintain and build at the instruction of the respondent and therefore at the cost of the respondent:

. . ."all main roads to the said Forest Area including Forest Tracks for logging."

Forest Area consists of several areas covered by Licence No.T/0212 issued to Sarawak Foundation. One of these areas is Kota Forest Reserve which is described in the agreement as the Contract Area. As the Contract Area is but a part of the Forest Area, when clause 3 refers to "all main roads to the said Forest Area" it must mean "all main roads to such part of the Forest Area" as it is covered by the agreement and in this case it must mean all main roads to Kota Forest Reserve. But under this clause the appellant was also required to build "Forest Tracks for logging". What then is the meaning to be attributed to this phrase? The appellant's counsel submitted that these are tracks to be built outside the Contract Area for the purpose of retrieving roadside logs, i.e. logs which would be cut and felled because of road construction leading to the Contract Area. With respect we cannot accept this submission. In the first place the agreement is an agreement to extract timber from inside the Contract Area. The felling of trees because of road construction is not the object of the agreement, it being purely incidental to the agreement. Secondly, the "Forest Tracks for logging" are to be constructed at the respondent's instructions and therefore at its own costs and these cannot be assimilated to or the same as "all timber tracks", which the appellant was required to construct and maintain at its own costs under clause 7 (e) of the agreement. Thirdly, the word "Tracks" in clause 3 cannot be given the same meaning as the word "tracks" in clause 7 (e) because the former is written with a capital "T" and qualified by the word "Forest" so as to read "Forest Tracks", whilst the latter is written with a small "t" and qualified by the word "timber", thus reading "timber tracks". In any case the Forest Tracks are for logging. As the logging was to be operated inside the Contract Area, it stands to reason that such Tracks must be the ones that were required to be constructed inside the area. For these reasons we think that the respondent's contention is correct in that under clause 3 of the agreement the appellant had to build roads both outside and inside the Contract Area and that the appellant should not have stopped the road construction at the boundary of the Contract Area but should continue building it right into the area. For the purpose of this case it makes no difference whether the road inside the Contract Area is referred to as Forest Tracks and that outside the Area

as main roads. In substance they are the same, i.e. one continuous way.

It is a fact that the appellant did not so continue the road construction. But it justified its failure to do so on the ground that unlike the road construction outside the Contract Area the respondent made no cuttings (rentis) for road alignments inside the Area and so it could not continue constructing it. The appellant produced a number of witnesses to testify to this effect, whilst the respondent on the other hand produced its own witnesses to prove to the contrary. The learned trial judge after hearing these witnesses did not believe the appellant's witnesses and thus made a finding that there were road alignments cut by the respondent not only outside but also inside the Contract Area. We must therefore accept this finding.

If, despite the existence of road alignments inside the Contract Area, the appellant chose not to continue with the road construction but to stop the work and to insist upon being supplied with approved blocks by the respondent, it only had itself to blame, because it had not yet fully performed its obligation under clause 3 of the agreement so as to enable the respondent to apply for the necessary blocks. A glance at the correspondence between the parties before the appellant took out the writ for this suit clearly shows that the respondent asked the appellant to complete the road construction twice, i.e. on September 22, 1977 (P6(B)) and November 19, 1977 (P13(B)). But the appellant, blinded by its impatience to get the blocks and its own mistake into thinking that all that it was required to build under clause 3 of the agreement was two miles of road outside the Contract Area, considered the respondent's allegation that the road construction was not completed as being ludicrous: See letter dated November 26, 1977 by the appellant's solicitors (P6(C)). Its solicitors completely misread the respondent's solicitors' letter of September 22, 1977 (P6(B)) in which the respondent said:

"The two miles of timber road leading from Merlabing Forest Reserve to Kota Forest Reserve *form part of the main road* to be constructed and built by you under the said Clause 3 ....."

(The emphasis is ours)

If the solicitors had taken a little time to read this sentence, they would have appreciated that the respondent was not disputing the fact of the completion of the two miles of road outside the Contract Area, but the completion of the other part of the main road under this clause. This part is loosely described by the respondent in various parts of the same letter as –

(a) "the main roads for you to carry out extraction works of timber in the Contract Area." (para 2);

(b) "the main road and all the other road construction necessary for you to carry out the extraction works". (para 2);

(c) "all roads necessary for the carrying out of the extraction works." ..... (para 7); and

(d) "road construction necessary for the extraction works," ..... (last para).

Thus if the text of this letter is properly appreciated, it is clear that the issue raised by the respondent was not an issue of fact as to whether or not the two miles of road were completely constructed, but an issue of law in that they alleged that the appellants had not built the main road according to clause 3 of the agreement, because the other part of the road, namely road necessary for extraction work was not yet constructed, although it had built part of it.

Even before us counsel for the appellant still went on to submit to us that the dispute between the parties was originally confined to the question of the completion or otherwise of the two miles of road outside the Contract Area. In support of this contention he referred us to the pre-writ correspondence between the parties and the respondent's own Statement of Defence. Finally he submitted that on the authority of *Farrell v. Secretary of State for Defence,*[1] it was not permissible for the respondent without amending its Statement of Defence to shift its defence to the question of the failure of the appellants to continue road construction inside the Contract Area.

With respect, we cannot accept this submission.

The dispute between the parties before the writ was taken out, as we have shown, was not confined to the factual issue as to whether or not the two miles of road were completed. We have already shown this by referring to the respondent's solicitors' letter dated September 22, 1977 (P6(B)). In this connection we also wish to refer to another letter by the respondent's solicitors dated November 19, 1977 (13(B)). By this letter the respondent requested the appellant to construct the road under clause 3 of the agreement and referred to such road construction as –

"the road construction necessary for the extraction works of timbers as required under Clause 3 of the Agreement" .....

These two letters from the respondent clearly indicate that the construction of the two miles of road outside the Contract Area was not enough and that the appellant was required to continue constructing the road "necessary for the extraction works".

As to the respondent's case not being supported by its Statement of Defence, we need only to reproduce the relevant paragraphs of this Statement of Defence and Counterclaim to show that this issue was pleaded:

(a) "The Plaintiff did not complete or failed to complete the said main roads in accordance with the regulations, rules, directions and requirements of the Forest Department or with the terms and conditions of the Timber Licence."
(para 4 of Statement of Defence)

(b) "the Defendant ..... did inform the Plaintiff verbally that the main road was not completed to the extent that blocks could be applied."
(para 6 of Statement of Defence)

(c) "The Defendant verbally informed the Plaintiff that it had to build and complete road construction undertaken under the said agreement in accordance with the regulations, rules, directions and requirements of the said Forest Department."
(para 10 of Statement of Defence/Counterclaim)

(d) "Then on or about ..... the Defendant ..... gave notice to the Plaintiff for it to complete road construction necessary for extraction works. The Plaintiff failed or omitted to do so ...."
(para 10 of Statement of Defence/Counterclaim)

The Statement of Defence may not be happily drafted in a way we would like it to be drafted, but it certainly does contain the respondent's contention that the appellant had to construct not only the road outside but also the road inside the Contract Area.

For the reasons given in the foregoing paragraphs we therefore dismiss this appeal with costs. Deposit to respondent against taxed costs.

Appeal dismissed.

Solicitors: *K.Y. Lin & Co.; Yong & Wong.*

YAP AMI & ANOR. v. TAN HUI PANG

[F.C. (Suffian L.P., Lee Hun Hoe C.J. (Borneo) and Abdul Hamid F.J.) June 5 & July 17, 1982]

[Kota Bharu – Federal Court Civil Appeal No. 149 of 1981]

Tort – Death in wild boar hunting accident – Damages for loss of dependency – Damages for loss of future earnings for the benefit of the estate – Civil Law Act, 1956, ss. 7 & 8.

In this case the deceased died in a wild boar hunting accident. His widow and another as representatives of his estate sued for damages on behalf of the deceased's dependants under section 7 and on behalf of his estate under section 8 of the Civil Law Act, 1956. Liability to the extent of 70% was admitted and the only question for the learned trial judge was damages. He awarded $2,800 for loss of expectation of life, $959 special damages and costs. He made no award for loss of dependency because on the agreed facts the deceased before his death was an active partner in a firm and as such partner was drawing $1450 per month and after this death that very sum was paid to the dependants as the deceased's share of the profits. He held therefore that the dependants suffered no loss. The appellants appealed.

Held: the plaintiffs were entitled to damages for loss of future earnings but in this case as the estate and the dependants had lost nothing, the learned trial judge was correct in making no award for loss of dependency.

Cases referred to:

(1) *Gammell* v. *Wilson* [1982] A.C. 27.
(2) *Thangavelu* v. *Chia Kok Bin* [1981] 2 M.L.J. 277.
(3) *Bishop* v. *Cunard White Star Co. Ltd.* [1950] P. 240; [1950] 2 All E.R. 22.
(4) *Davies* v. *Powell Duffryn Collieries* [1942] A.C. 601.
(5) *Taylor* v. *O'Connor* [1971] A.C. 115.
(6) *Pym* v. *Great Northern Ry.* (1863) 4 B. & S. 396; 122 E.R. 508.
(7) *New Monckton Collieries Ltd.* v. *Keeling* [1911] A.C. 648
(8) *Lee* v. *S.S. Bessie* [1912] 1 K.B. 83.

FEDERAL COURT.

Ong Chin Beng (*Foo Say Ghee* with him) for the appellant.

H.S. Lim for the respondent.

Cur. Adv. Vult.

Suffian L.P. (read by Abdul Hamid F.J.): Mr Chua Kim Long ("the deceased") died in a wild boar hunting accident in Telaga Papan, Trengganu, and his widow and another as representatives of his estate sued for damages on behalf of the deceased's dependants under section 7 and on behalf of his estate under section 8 of the Civil Law Ordinance, 1956 ("the Ordinance").

Liability to the extent of 70% was admitted and so the only question for the learned trial Judge